SUBJECT INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Short statement of the case	2
The initial inspection by F. B. I. agents	4
Insufficient affidavit used to secure search warrant	8
The admitted search and seizure	8
Questions presented by this appeal	9
Summary of the argument	10
Argument	11
I. The initial inspection of the books and records by agents of the F. B. I. was unauthorized and unlawful and violated the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States. Title 10, Section 310L, was only meant to authorize administrative inspection and audit, and not investigation and search and seizure for criminal prosecution	11
II. The authority to inspect and audit is limited directly to the agencies designated by the statute and the Executive Order of the President pursuant thereto, and cannot be delegated by a subordinate in the Navy Department even if the authority to audit and inspect extended to the Navy Department there was no authority of a subordinate to delegate it to the F. B. I.	14

PAGE

III.

The admitted search and seizure of defendant's books and records, pursuant to the search warrant of December 1, which the Government concedes were obtained on an insufficient affidavit, were in violation of defendant's constitutional rights under the Fourth Amendment to the Constitution of the United States 16

IV.

The District Court erred in refusing to suppress and return the evidence thus unlawfully searched and seized upon timely motions to do so 18

V.

The use in evidence of such books and records violated the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States 20

Conclusion 26

INDEX TO APPENDIX.

PAGE

Statutes involved:

United States Code, Title ....., Sec. 80 (Criminal Code, Sec. 35(a)) 1

United States Code, Title 18, Sec. 611 2

United States Code, Title 18, Sec. 612 2

United States Code, Title 18, Sec. 613 3

United States Code, Title 18, Sec. 614 3

United States Code, Title 18, Sec. 615 4

United States Code, Title 18, Sec. 616 4

United States Code, Annotated, Title 18 (Criminal Code and Criminal Procedure) 4

United States Code, Annotated, Title 50 (Sec. 643) War, p 282 5

United States Constitution, Fourth Amendment 1

United States Constitution, Fifth Amendment 2

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Boyd v. United States, 29 L. Ed. 752	17, 19, 20, 22, 24,
Byers v. United States, 71 L. Ed. 520	17, 20
Byars v. United States, 273 U. S. 28	20, 22
Compton v. Northwest Eng. Co., 116 Cal. App. 523	13
Cudahy Packing Company v. Holland, 315 U. S. 357	14
Entick v Carrington, 19 Howard St. Tr. 1029	20, 21
Go-Bart Importing Co. v. United States, 282 U. S. 344	20
Goldstein v. United States, 316 U. S. 114, 86 L. Ed. 1321	15
Feldman v. United States, 322 U. S. 487, 88 L. Ed. 1408	15, 20, 23, 24, 25, 26
Gouled v. United States, 255 U. S. 298	20, 22
Grau v. United States, 77 L. Ed. 212	17, 19, 20
Michelson v. Painter, 35 Cal. 705	13
People v. Gurin, 85 Cal. 238	13
People v. Richter (N. Y.), 265 App. Div. 767	14
Silverthorne Lumber Co. v. United States, 251 U. S. 385	13, 15
Simpson v. Nielson, 77 Cal. 297	13
Takahashi v. United States, 143 Fed. (2d) 118	19, 20
United States v. Lefkowitz, 285 U. S. 452	20, 21, 22
Weeks v. United States, 232 U. S. 383, 58 L. Ed. 542, 34 S. Ct. 341	17, 18, 20, 22
Zottman's Case, 20 Cal. 102	13

STATUTES.

Criminal Appeals Rules, Rule 11	2
Criminal Appeals Rules, Rule 13	2
Executive Order 9127 (7 F. R. 2753)	2, 11, 12, 13
Judicial Code, Sec. 240(a) as amended by the Act of February 13, 1925	2

PAGE

Rules of the Supreme Court, Rule 33 2

United States Code, Title 10, Sec. 310(1) (Second War Powers Act, 50 U. S. C., Sec. 643) 2

United States Code, Sec. 310L (Second War Powers Act, Sec. 1301 et seq.) 11

United States Code, Title 18 Sec. 80 2

United States Code, Title 18, Sec. 611 19

United States Code, Title 18, Sec. 612 19

United States Code, Title 18, Sec. 613 19

United States Code, Title 18, Sec. 614 19

United States Code, Title 18, Sec. 615 19

United States Code, Title 18, Sec. 616 19

United States Code, Title 18, Sec. 626 ..... 19, 26

United States Constitution, Fourth Amendment 15, 19, 26

United States Constitution, Fifth Amendment 19, 26

IN THE

Supreme Court of the United States

October Term, 1945

No. 489

EDWARD F. ZAP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

To the Honorable Harlan F. Stone, Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States:

Opinion Below.

The opinion of the Circuit Court of Appeals [R. 805-807] is reported in 151 Fed. (2d) 100, 101.

Jurisdiction.

The decision of the Circuit Court of Appeals affirming the judgment below was filed June 4, 1945. [R. 807, 808.] A petition for rehearing, duly filed, was denied September 13, 1945. [R. 809.] The petition for writ of certiorari was filed October 8, 1945, and was denied December 10, 1945. On petition for rehearing filed January 2, 1946, certiorari was granted January 7, 1946.

The jurisdiction of the Supreme Court is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Criminal Appeals Rules promulgated by the Supreme Court May 7, 1934. The petition for rehearing was filed pursuant to Rule 33 of the Rules of the Supreme Court.

Short Statement of the Case.

Appellant, Edward F. Zap, one of the foremost experimental aviation engineers in the United States, was a private contractor, having prime aviation experimental contracts with the Government of the United States. He kept books and records [Govt's Exhibits 34 to ~~36~~ 32] and had various bank accounts, both relating to his business [Exhibit 32] with the Navy and to his private accounts. [Exhibit 7.] Because of the need of great secrecy in relation to his type of experimental work, which involved the shortening of the distance for a plane to take off and land aboard ship and on land [R. 562, *et seq.*] and other matters relating to the war effort, all of his books and records were kept in private safes in his private office.

Pursuant to the provisions of Title 10, Section 310(1) as amended by the Second War Powers Act, Title 50, Section 643 and the President's Executive Order No. 9127, the Navy had cost inspectors in Zap's plant from time to time, who were permitted to examine the books and records for their own department, the Navy. [R. 291, 489, 490.]

Appellant was convicted on counts IV and V of an indictment charging him with violation of Title 18, Section 80, in the District Court of the United States, Southern District of California, Central Division.

Count IV charged the appellant with unlawfully, knowingly, wilfully and feloniously making and presenting a

false claim for payment and approval by the Navy. [R. 8-9.]

Count V charged appellant with having covered up and concealed, by trick, scheme and device, a material fact, and made and caused to be made a false and fraudulent statement and representation in a matter within the jurisdiction of the United States Navy.

The means alleged in Count V was that he represented to Hilton Byars, who was then and there the Navy Cost Inspector, that the sum of $4,000.00 had been paid to William H. McAvoy for acting as a test pilot in conducting certain tests under appellant's Contract No. 83142 and that he presented to said Cost Inspector in support of said false statement and representation a cancelled check for $4,000.00 endorsed by said William H. McAvoy. [R. 9, 10, 11.]

In the trial of the case, the books and records of the appellant which had been searched and seized on a search warrant admittedly defective because of the affidavit in support thereof and the check for $4,000.00, which had been secured from a bookkeeper of the appellant from appellant's private safe during appellant's absence from the city, were introduced in evidence against the petitioner and used to convict him, after timely motions to suppress and return the evidence had been denied and subsequent objections to the introduction of the books and records in evidence overruled, and motion to strike the check for $4,000.00 denied, each of them being made upon the grounds that the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States had been and were being violated, and exceptions noted.

The books and records thus used formed the principal basis of the testimony against appellant. [R. 368 *et seq.*]

The testimony of Lucien Smith Minor, the testimony of Thomas Cedric Browne [R. 419 *et seq.*], the testimony of Ethel Boyle [R. 467 *et seq.*, 473 *et seq.*], the testimony of Harry Champlin [R. 481, 484 *et seq.*], testimony of Hilton Jack Byars [R. 505, 506 *et seq.*], testimony of Ethel Boyle. [R. 554, 555.] See also objections to final introduction of books and records in evidence. [R. 665.]

Naval procedure was set up for correcting mistakes and otherwise reviewing matters, if either the Government or the contractor desired it.

The essential facts of the inspection and examination of the books and records in Zap's absence and without his consent by Agents of the F. B. I., of their subsequent search and seizure on faulty and insufficient affidavit in support of a purported search warrant, and their subsequent use in evidence over vigorous objections of the defense, after timely motions to suppress had been denied, are uncontroverted.

THE INITIAL INSPECTION BY F. B. I. AGENTS.

On October 20, 1942, after Zap left for Washington, D. C. and while he was gone, and without his knowledge or consent, F. B. I. Agents Myerson and Sloane came to Zap's plant and commenced searching books and records of Zap's plant. [R. 135, *et seq.*]

Daily they went through the books and records of the petitioner, in his absence. They got employees in his service to get private books and records out of his private files and safes, out of his private office. [R. 151.] According to the affidavit of Ethel Boyle, bookkeeper.

> "They commenced searching the premises and went into the back of the office and into Mr. Zap's private office; that they returned from that time on daily and

spent considerable time each day in the said offices; that at no time on any of these daily visits did they ever * * * display or hold any search warrant." [R. 151, 152.]

"That they frequently asked affiant to get different books from the safe and examined same. That the safe was always locked and had to be opened, and the F. B. I. officers asked affiant to open the same each morning and whenever they wanted something out of it; this took place all through November, 1942. [Affidavit of Ethel Boyle, R. 153.]

"That she personally observed Murray B. Myerson and James S. Sloane examining these documents and records over a period of several days during November, 1942, and making notes thereon; that James S. Sloane copied and made notes on work sheets from the books, and on one occasion he came to affiant and said he could not make his sheets balance and asked affiant if she had a balance and to compare his figures with hers; that ~~he then~~ showed affiant a search warrant to examine or look at these books; they are the books taken on December 1, 1942. (R. 155)

he at no time

"That some time on or about November 5, 1942, which date affiant recalls was the date of Mr. Zap's arrest, Mr. Murray B. Myerson came to affiant and said he wanted to get a cancelled check for $4,000[1] which was made out to William H. McAvoy; that at that time he had no search warrant for the same and did not display any; that affiant showed him where the check was in the file and he asked for it and affiant gave it to him; affiant also opened up the safe

[1]This later became Government's Exhibit No. 7. Motions in advance of trial to suppress and return it were denied. Motion to strike was also denied. Exceptions noted.

daily from November 5th until December 4th or 5th, 1942, for Mr. Myerson and Mr. Sloane and they went into the safe and took such books and records as they wanted with them to another part of the building, and would bring them back later in the day, and then the next day they would again ask for the books and records and again take them to another part of the building, returning them to affiant later in the day to lock in the safe." [R. 155, 156.]

This affidavit was corroborated by the affidavit of Estelle Zap. [R. 156.] None of the affidavits of the inspection without a search warrant were denied or controverted.

Hilton Byars, a senior accountant, a civilian, employed by the United States Navy, filed an affidavit in which he stated that two F. B. I. agents, to-wit, Murray B. Myerson and James C. Sloane, connected with offices at Los Angeles, for a period of six or seven weeks, commencing on or about October 20, 1942, made an audit and inspection of the books of account and record of Edward F. Zap at Zap's place of business, 1005 Broxton Avenue, Los Angeles, California, "under the auspices of and by and with the authority of your affiant and Lieutenant Lucien Smith Minor of and for the United States Navy." [R. 193-194.] Minor was also a Navy cost inspector assigned to Zap's plant.

Byars stated:

"That at all times during said period from on or about October 20, 1942, to and including the 1st day of December, 1942, all said books of account and records of Edward F. Zap pertaining to and under said contracts were within the custody of the United States Navy, pursuant to said contracts and the terms and provisions thereof, and said United

States Navy refused and declined to permit any person whatsoever to remove any of said books of account and records, or either of them, without a warrant." [R. 195.]

On or about November 6, 1942, Zap called a meeting of his several employees, and in the presence of Myerson and Sloane objected to their entering his safe and using Champlin, saying, "It is not right for you to go in there and use Champlin, as he is the crook and is trying to smear me. He has already been fired and has no right to be in the office, and no one has any right to look at these papers as they are the confidential papers of Edward F. Zap Aeronautical Engineers and concern their contracts with the navy." That the said Myerson and Sloane did not at that time have any search warrant for the examination of the books, papers, records, ledgers, ledger sheets, cost sheets, payroll accounts, journals and documents. [R. 149.]

When Zap protested that no one had any right to enter the safe and look at these confidential records and documents Myerson said he was going to examine them for himself and find out what facts he could, and stated to Zap, "You had better go on home and have a scotch and soda and forget your troubles here." [R. 149.]

Ethel Boyle also made an affidavit that all of these books, records and documents were in a safe or in the personal desk of Mr. Zap and could not be observed, but that from time to time these F. B. I. agents asked her to open the safe each morning, and whenever they wanted to get something out of it, and that as a result they continued their inspection during the month of November. [R. 153-156.] This is corroborated by the affidavit of Estelle Zap. [R. 157-160.]

INSUFFICIENT AFFIDAVIT USED TO SECURE SEARCH WARRANT.

On December 1, 1942, Myerson made an affidavit for a search warrant pursuant to which search warrant he seized, according to his return, the exhibits which were later admitted in evidence as Exhibits 32, 34 to 45 in evidence. This affidavit did not set forth the commission of any crime or any probable cause. [R. 177-9.]

THE ADMITTED SEARCH AND SEIZURE.

By their own affidavit and return, F. B. I. Agents Murray B. Myerson and James S. Sloane admit that they made both a search and seizure on December 1 of books and records which were later introduced in evidence over objections that they were illegally searched and seized.

Agents Myerson and Sloane in their return to the search warrant said:

> "Pursuant to the within search warrant, there were seized at the office of the Zap Aeronautical Engineers, 1005 Broxton Avenue, Westwood Village, Los Angeles, Calif., the following:
>
> "1. Job Cost Ledger—Fixed Fee.
>
> 2. Job Cost Ledger.
>
> 3. General Ledger, and transfer sheets.
>
> 4. Combination cash book, check register and journal.
>
> 5. Payroll ledger and transfer sheets.
>
> 6. Invoice received from University of Washington, Seattle, Wash., dated Aug. 28, 1942.

7. Two books of check stubs.

8. Time cards for weeks ending Sept. 30, 1942, and Oct. 7, 1942.

9. Vouchers and supporting papers relative to contract NXs-4105.

10. Vouchers and supporting papers relative to contract 83142.

11. Cancelled checks of E. F. Zap Aernautical Engineers and E. F. Zap 9 pckgs. Mar. to Nov., 1942."

In advance of trial, motions were made to suppress and return the evidence thus illegally searched and seized. [R. 128, *et seq.*] The court denied the motions [R. 33, 203, 204], exception noted.

During the trial of the case, objections were made to the use of the books and records on the grounds that they violated the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States, and motions were made to suppress the evidence. These motions were denied and exceptions allowed. [R. 368, 380, 419-20, 553.]

Questions Presented by This Appeal.

WHETHER THE BOOKS AND RECORDS RELATING TO THE APPELLANT'S CONTRACT WITH THE NAVY DEPARTMENT WERE PROPERLY ADMITTED AS EVIDENCE AT HIS TRIAL.

Summary of the Argument.

I.

THE INITIAL INSPECTION OF THE BOOKS AND RECORDS BY AGENTS OF THE F. B. I. WAS UNAUTHORIZED AND UNLAWFUL, AND VIOLATED THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. TITLE 10, SECTION 310L, WAS ONLY MEANT TO AUTHORIZE ADMINISTRATIVE INSPECTION AND AUDIT, AND NOT INVESTIGATION AND SEARCH AND SEIZURE FOR CRIMINAL PROSECUTION.

II.

THE AUTHORITY TO INSPECT AND AUDIT IS LIMITED DIRECTLY TO THE AGENCIES DESIGNATED BY THE STATUTE AND THE EXECUTIVE ORDER OF THE PRESIDENT PURSUANT THERETO, AND CANNOT BE DELEGATED BY A SUBORDINATE IN THE NAVY DEPARTMENT.

III.

THE ADMITTED SEARCH AND SEIZURE OF DEFENDANT'S BOOKS AND RECORDS, PURSUANT TO THE SEARCH WARRANT OF DECEMBER 1, WHICH THE GOVERNMENT CONCEDES WAS OBTAINED ON AN INSUFFICIENT AFFIDAVIT, WERE IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

IV.

THE DISTRICT COURT ERRED IN REFUSING TO SUPPRESS AND RETURN THE EVIDENCE THUS UNLAWFULLY SEARCHED AND SEIZED UPON TIMELY MOTIONS TO DO SO.

V.

THE USE IN EVIDENCE OF SUCH BOOKS AND RECORDS VIOLATED THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT.

I.

The Initial Inspection of the Books and Records by Agents of the F. B. I. Was Unauthorized and Unlawful and Violated the Defendant's Rights Under the Fourth and Fifth Amendments to the Constitution of the United States. Title 10, Section 310L Was Only Meant to Authorize Administrative Inspection and Audit, and Not Investigation and Search and Seizure for Criminal Prosecution.

The authority to audit and inspect the books and records of prime contractors was an administrative authority. Title 10, Section 310L as amended by the Second War Powers Act, Section 1301; *et seq.*

Congress was interested in encouraging aviation and to keep correct accounts when it passed Title 10, Section 310L, permitting auditing and inspection of defense prime contractors' books, pursuant to the purposes of that statute. The Second War Powers Act, amending this section, specifically authorized the President to designate who might inspect the books and records of such defense prime contractors. Pursuant to this authority, the President of the United States issued his executive order 9127 (7 F. R. 2753), in which he specifically designated the right of inspection to be exercised by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, and the Board of Directors of the Reconstruction Finance Corporation, respectively, or in their discretion and by their direction, respectively, may be exercised also by and through any officer or officers or civilian officials of their respective departments and agencies designated by them for those purposes.

The F. B. I. was not an agency so designated by the Act or Executive Order. The Secretary of the Navy at no time ever designated any F. B. I. agent or civilian to act.

The only person who claimed to have given any authority to Agents Myerson and Sloane was the civilian Inspector Byars, who, of course, had no authority under the Act to do so. He was not the head of the department. Agents Myerson and Sloane were not in his department.

Executive Order 9127 (7 F. R. 2753) provides as follows:

> "1. I hereby designate the War Production Board, the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation as the governmental agencies authorized to inspect the plant and to audit the books and records, as provided by Title XIII of the said Second War Powers Act, 1942."
>
> "2. The authority herein conferred may be exercised by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, and the Board of Directors of the Reconstruction Finance Corporation, respectively, or in their discretion and by their direction, respectively, may be exercised also by and through any officer or officers or civilian officials of their respective departments and agencies designated by them for those purposes. The Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, or the Board of Directors of the Reconstruction Finance Corporation may authorize

such officer or officers or civilian officials of their respective departments or *agencies to make further delegations of such powers and authority within their respective departments and agencies.*" (Italics ours.)

According to the affidavit, another civilian Navy auditor, Greenfield, objected to the F. B. I. agents searching the books and records without any court authority, but his objections were ignored.

Even civilian inspector Byars said that he gave the F. B. I. agents permission but did not let them remove the books and records without a search warrant. Byars said that "Said United States Navy refused and declined to permit any person whatsoever to remove any of said books of account and record, or either of them, without a warrant." [R. 194-195.]

It is respectfully submitted that the initial inspection by the F. B. I. was without warrant or authority in law.

The President's Executive Order 9127 (F. R. 2753).

The mode is the measure of power.

The *mode* prescribed in a statute for the exercise of a power is the "measure the power", and this rule is especially applicable to constitutional provisions.

People v. Gurin, 85 Cal. 238;

Michelson v. Painter, 35 Cal. 705;

Zottman's Case, 20 Cal. 102;

Simpson v. Nielson, 77 Cal. 297;

Compton v. Northwest Eng. Co., 116 Cal. App. 523.

Silverthorne Lumber Co. v. U. S., 251 U. S. 385.

II.

The Authority to Inspect and Audit Is Limited Directly to the Agencies Designated by the Statute and the Executive Order of the President Pursuant Thereto, and Cannot Be Delegated by a Subordinate in the Navy Department Even if the Authority to Audit and Inspect Extended to the Navy Department There Was No Authority of a Subordinate to Delegate It to the F. B. I.

Authority to delegate the right of inspection must be conferred either by statute or the executive order issued pursuant thereto. Otherwise, the power does not exist.

Cudahy Packing Company v. Holland, 315 U. S. 357, 363.

The right of inspection has always been and must be differentiated from the right of search and seizure.

People v. Richter (N. Y.), 265 App. Div. 767.

The authority to inspect the books and records of the petitioner was specifically limited by statute and executive order to the heads of the designated agencies and to those specifically delegated by the heads of those agencies in their respective departments.

Such statutory authority is limited to those particular persons so designated. The Government concedes that the affidavit in support of the search warrant was faulty. Therefore, all that had been searched prior to that time

and seized, based upon the faulty warrant, were in violation of the defendant's Constitutional rights.

Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 64 L. Ed. 319;

Goldstein v. U. S., 316 U. S. 114, 127, 86 L. Ed. 1321;

Feldman v. U. S., 322 U. S. 487, 88 L. Ed. 1408.

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all . . . the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

Silverthorne Lumber Co. v. U. S., 251 U. S. 385.

The guaranties of the Fourth Amendment "are to be liberally construed to prevent impairment of the protection extended." *Grau v. United States*, 287 U. S. 124, 128, 77 L. Ed. 212, 215, 53 S. Ct. 38, and cases cited."

III.

The Admitted Search and Seizure of Defendant's Books and Records, Pursuant to the Search Warrant of December 1, Which the Government Concedes Were Obtained on an Insufficient Affidavit, Were in Violation of Defendant's Constitutional Rights Under the Fourth Amendment to the Constitution of the United States.

F. B. I. agents Myerson and Sloane admitted in their return to the search warrant of December 1, 1942, that they had made a "search and seizure" of the books and records of the petitioner. [R. 176.] It has since been admitted that the affidavit upon which this search was made was insufficient, and therefore null and void.

In the Government's brief in opposition to the petition for certiorari, the Government says:

> "As to the records introduced against petitioner, the significant facts are that F. B. I. agents, acting under the authority of the Navy, conducted an audit of petitioner's books; that in the course of that examinaion they kept possession of Exhibit 7 (the $4,000 check to test pilot McAvoy); and, at the close of their investigation, obtained a search warrant for petitioner's books and records *on the basis of an affidavit, which we concede to be technically deficient in that it failed to set forth grounds for believing that petitioner had committed an offense.*" (Government's Brief pp. 11 and 12.)

The Government also says:

"Since the examination of petitioner's records was proper, *the technical invalidity of the affidavit by which the search warrant of December 1 was obtained does not,* we submit, render the documents inadmissible in evidence." (Italics ours.) (Government's Brief p. 14.)

Grau v. U. S., 77 L. Ed. 212, and cases cited therein.

Therefore, the timely motions to suppress the evidence thus seized should have been granted.

Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 542, 34 S. Ct. 341;

Boyd v. U. S., 29 L. Ed. 752;

Byers v. U. S., 71 L. Ed. 520;

Grau v. U. S., 77 L. Ed. 212, and cases cited.

IV.

The District Court Erred in Refusing to Suppress and Return the Evidence Thus Unlawfully Searched and Seized Upon Timely Motions to Do So.

Timely motions were made to suppress the evidence in advance of trial, which motions were denied by the court. Government's Exhibit 7, for which no search warrant was ever secured, nor was there any specification thereof, as it had been seized on November 5, 1942, and not on December 1, 1942, pursuant to the search warrant based upon the faulty affidavit, was illegally introduced in evidence over a prior motion to suppress and return it, and also through a motion to strike the evidence.

The Fourth Amendment.

Weeks v. U. S., 232 U. S. 383, Title 18, Section 626.

"**Sec. 626. Restoration of property taken; retention of custody of property by officer or other disposition.** If it appears that the property or paper taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken; but if it appears that the property or paper taken is the same as that described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the judge or commissioner shall order the same retained in the custody of the person seizing it or to be other-

wise disposed of according to law. (June 15. 1917, c. 30, Title XI, Sec. 16. 40 Stat. 229.)"

Title 18, U. S. C. A., Criminal Code and Criminal Procedure.

But if we were, for the sake of argument, to pass by the search, we still have the problem of illegal seizure, for the Fourth Amendment to the Constitution of the United States forbids not only illegal search, but illegal seizure.

Boyd v. U. S., 116 U. S. 616, 641, 29 L. Ed. 752;
Takahashi v. U. S., 143 Fed (2d) 118.

The Fourth Amendment forbids two things: (1) illegal search; (2) illegal seizure.

It is not contended that the statute which permits audit and inspection permits seizure.

The guarantees of the Fourth Amendment are to be liberally construed to prevent impairment of the protection extended.

Grau v. U. S., 77 L. Ed. 212.

The motions, therefore, to suppress the evidence should have been granted and the objections to their introduction in evidence should have been sustained [R. 128, *et seq.*; R. 663, *et seq.*] as violative of the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States.

The court's rulings were directly in violation of the defendant's rights under the Fourth and Fifth Amendments, and the statutory provisions, Title 18, Sections 611 to 616, and the mandate of Section 626, Title 18, U. S. Codes, inclusive, pursuant thereto.

V.

The Use in Evidence of Such Books and Records Violated the Defendant's Rights Under the Fourth and Fifth Amendments to the Constitution of the United States.

There is also another element in this case, even if we were to pass both the search and seizure. The use in evidence of these books and records is forbidden by the Fifth Amendment to the Constitution of the United States.

Boyd v. U. S., 29 L. Ed. 752;

Takahashi v. U. S., 143 Fed. (2d) 118.

By a long line of cases, the constitutional provisions against unlawful search and seizure and their use in evidence against an accused have been steadfastly upheld.

Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 542, 34 S. Ct. 341;

Boyd v. U S., 29 L. Ed. 752;

Byers v. U. S., 71 L. Ed. 520;

Grau v. U. S., 77 L. Ed. 212, and cases cited;

Feldman v. U. S., 88 L. Ed. 1414.

The search and seizure of any papers under the circumstances of this case and the subsequent use of such papers as evidence against the owner thereof violate the defendant's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States.

Entick v. Carrington, 19 Howard St. Tr. 1029;

Boyd v. U. S., 116 U. S. 616;

Weeks v. U. S., 232 U. S. 383;

Gouled v. U. S., 255 U. S. 298;

Byars v. U. S., 273 U. S. 28;

Go-Bart Importing Co. v. U. S., 282 U. S. 344;

U. S. v. Lefkowitz, 285 U. S. 452.

This case is comparable with the case of *U. S. v. Lefkowitz*, 285 U. S. 452, 467, where this court said that searches and seizures of the books and records could not be seized for the purpose of using them as evidence, and quoted with approval:

> "'Any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the 4th and 5th Amendments run almost into each other.' And this Court has always construed provisions of the Consitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions."
>
> 285 U. S. 456, 77 L. Ed. 883.

Like the *Lefkowitz* case, the papers and other articles seized and taken were in themselves unoffending. This court there said:

> "Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending."

In *Entick v. Carrington*, 19 Howard St. Tr. 1029, a case of seditious libel, the famous Lord Justice said that such a search is the means of detecting offenders by discovering evidence, but the court held that in the criminal law, such a proceeding was never heard of, saying:

> "But our law has provided no paper search in these cases to help forward the conviction."

The case is quoted at length with approval in *Boyd v. U. S.*, 116 U. S. 616, 629, 29 L. Ed. 746, 750.

This doctrine is also approved in *Weeks v. U. S.*, 232 U. S. 383, where the court ordered the papers suppressed and returned. Also in *Gouled v. U. S.*, 255 U. S. 298, and in *U. S. v. Lefkowitz*, 285 U. S. 452.

In *Byars v. U. S.*, 273 U. S. 28, 71 L. Ed. 520, the court said:

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidence of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed. Weeks v. United States, 232 U. S. 383, 393, 58 L. ed. 652, 655, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177; Gouled v. United States, 255 U. S. 298, 306, 65 L. ed. 647, 651, 41 Sup. Ct. Rep. 266; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 391, 64 L. ed. 319, 321, 24 A. L. R. 1426, 40 Sup. Ct. Rep. 182; Agnello v. United States, 269 U. S. 20, 33, 70 L. ed. 145, 149, 46 Sup. Ct. Rep. 4."

> ". . . evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, Weeks v. United States, 232

U. S. 383, 58 L. ed. 652, 34 S. Ct. 341, L. R. A. 1915 B, 834, Ann. Cas. 1915C 1177, *supra;* Gouled v. United States, 255 U. S. 298, 65 L. ed. 647, 41 S. Ct. 261; Agnello v. United States, 269 U. S. 20, 70 L. Ed. 145, 46 S. Ct. 4, 51 A. L. R. 409."

Feldman v. U. S., 322 U. S. 491, 88 L. Ed. 1414.

"'. . . . knowledge gained by the Government's own wrong cannot be used by it.' Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392, 64 L. ed. 319, 321, 40 S. Ct. 182, 24 A. L. R. 1426. This Court has refused to draw nice distinctions as to when wrongful acquisition of evidence by state agencies was also a federal enterprise. When a representative of the United States is a participant in the extortion of evidence or in its illicit acquisition, he is charged with exercising the authority of the United States. Evidence so secured may be regained, Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L. ed. 374, 51 S. Ct. 153, and its admission, after timely motion for its suppression, vitiates a conviction. Byers v. United States, 273 U. S. 28, 71 L. ed. 520, 47 S. Ct. 248."

Feldman v. U. S., 322 U. S. 491, 88 L. ed. 1414.

Mr. Justice Black, in the same case, said:

"In Boyd v. United States, this Court said that 'any compulsory discovery by extorting the party's oath . . . is contrary to the principles of a free government. It is abhorrent . . . to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure at-

mosphere of political liberty and personal freedom.' 116 U. S. 616, 631, 632, 29 L. ed. 746, 751, 6 S. Ct. 524."

Feldman v. U. S., 322 U. S. 491, 88 L. ed. 1415.

And the *Boyd* case points out that using one's own books and records is compelling a person to be a witness against himself.

As Justice Black commented in the case of *Feldman v. U. S.*,

"And history supports no argument that the framers of the Fifth Amendment were interested only in *forbidding* the *extraction* of an accused's testimony, as distinguished from the *use* of his extracted testimony. The extraction of testimony is, of course, but a means to the end of its use to punish. Few persons would seriously object to testifying unless their testimony would subject them to future punishment. The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him. By broadly outlawing the practice of compelling such testimony the Fifth Amendment struck at this evil at its source, seeking to eliminate the possibility that compelled testimony would ever be available for use to punish a defendant."

Footnote:

"See United States v. Burr (C. C.) Fed. Cas. No. 14,692e; Counselman v. Hitchcock, 142 U. S. 547, 564-566, 35 L. ed. 1110, 1114, 1115, 12 S. Ct. 195, 3

Inters. Com. Rep. 816; Brown v. Walker, 161 U. S. 591, 594, 600, 605, 606, 40 L. Ed. 819, 820, 822, 824, 16 S. Ct. 644, 5 Inters. Com. Rep. 369; cf. *Ex parte* Lange, 18 Wall. (U. S.) 163, 173, 21 L. ed. 872, 877. And see Pittman, op. cit., *supra,* note 11; and cases cited notes 5, 6, and 7, *supra.*"

Feldman v. U. S., 322 U. S. 491, 88 L. ed. 1414 at 1418.

Justice Black further said, in *Feldman v. U. S.*:

"As the Fifth Amendment heretofore has been interpreted, Feldman's testimony could not have been used for this purpose had it been compelled by a federal court rather than the state court. This would have been true whether the federal court proceeding had been non-criminal or criminal, and whether Feldman had testified as a mere witness or as a defendant. Nor could his forced testimony have been used had it been compelled by federal officers outside of a court room; by foreign detectives in a foreign country inquiring into commission of an offense against the United States committed on the high seas; or by state officers interrogating a suspect for the purpose of enforcing a federal law. There is, then, no sanction in the precedents of this Court for viewing the Fifth Amendment's prohibition against compelled testimony with grudging eyes and reducing its scope to the narrowest plausible limits. As the decisions reflect, the previously declared attitude of the Court toward this prohibition has been that it 'must have a broad construction in favor of the right which it was intended to secure.' Counselman v. Hitchcock, 142 U. S. 547,

562, 35 L. ed. 1110, 1113, 12 S. Ct. 195, 3 Inters. Com. Rep. 816; McCarthy v. Arndstein, 266 U. S. 34, 69 L. ed. 158, 45 S. Ct. 16, 4 Am. Bankr. Rep. (N. S.) 712."

Feldman v. U. S., 322 U. S. 491, 88 L. ed. 1416.

Conclusion.

Wherefore, the defendant prays that the judgments and each of them be reversed and that the court order the evidence suppressed in accordance with the Fourth and Fifth Amendments and Title 18, Section 626, and that the books, record and papers be ordered returned to the defendant.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant.

APPENDIX.

Statutes Involved.

Sec. 80. *(Criminal Code, Section 35 (a).) Presenting False Claims.* Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015; June 18, 1934, c. 587, 48 Stat. 996; April 4, 1938, c. 69, 52 Stat. 197.)

The Fourth Amendment to the Constitution of the United States, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States, which provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, *without due process of law;* nor shall private property be taken for public use, without just compensation."

Title 18, Section 611, which provides:

"A search warrant authorized by this chapter may be issued by a judge of a United States district court, or by a judge of a State or Territorial court of record, or by a United States commissioner for the district wherein the property sought is located."

Title 18, Section 612:

"A search warrant may be issued under this chapter upon either of the following grounds:

"1. When the property was stolen or embezzled in violation of a law of the United States; in which

case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

"2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

"3. When the property, or any paper, is possessed, controlled, or used in violation of section 98 of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed."

Title 18, Section 613:

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

Title 18, Section 614:

"The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them."

Title 18, Section 615:

"The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

Title 18, Section 616:

"If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States.

"Sec. 626. Restoration of property taken; retention of custody of property by officer or other disposition. If it appears that the property or paper taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken; but if it appears that the property or paper taken is the same as that described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the judge or commissioner shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law. (June 15, 1917, c. 30, Title XI, Sec. 16, 40 Stat. 229.)"

stating the particular grounds or probable cause of its issue and the names of the persons whose affi-

davits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

U. S. Code Annotated, Title 50 (Sec. 643) War, p. 282, provides as follows:

"643. Plant, books, and records of war contractors; definition of defense contract; agency designated to administer provisions.

"The provisions of section 10 (1) of an Act approved July 2, 1926 (44 Stat. 787; 10 U. S. C. 310 (1) (giving the Government the right to inspect the plant and audit the books of certain Contractors), shall apply to the plant, books, and records of any contractor with whom a defense contract has been placed at any time after the declaration of emergency on September 8, 1939, and before the termination of the present war: Provided, That, for the purpose of this title, the term 'defense contract' shall mean any contract, subcontract, or order placed in furtherance of the defense or war effort: And provided further, That the inspection and audit authorized herein, and the determination whether a given contract is a 'defense contract' as defined above, shall be made by a governmental agency or officer designated by the President, or by the Chairman of the War Production Board. Mar. 27, 1942, 3 p.m., E.W.T., c. 199, Title XIII, 1301, 56 Stat. 185.

Executive Order No. 9127
April 10, 1942, 7 F.R. 2753

Inspection of Plants and Audit of Books of Defense Contractors

"By virtue of the authority vested in me by the Constitution and laws of the United States, and particularly by Title I of the First War Powers Act, 1941 (sections 601 *et seq.* of this Appendix), as President of the United States and Commander in Chief of the Army and Navy of the United States, and in order to prevent the accumulation of unreasonable profits, to avoid waste of Government funds, and to implement other measures which have been undertaken to forestall price rises and inflation, it is hereby ordered as follows:

"1. I hereby designate the War Production Board, the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation as the governmental agencies authorized to inspect the plant and to audit the books and records, as provided by Title XIII of the said Second War Powers Act, 1942. Such inspection and audit and the determination whether a given contract is a defense contract, as defined in Title XIII of the Second War Powers Act, 1942, may be made in the case of (a) any contractor with whom a defense contract has been placed by such agency, or, in the case of the Reconstruction Finance Corporation, by any corporation created or organized by it, at any time after the declaration of emergency on September 8, 1939, and before the termination of the present war, and in the case of (b) any subcontractor performing work required by any such defense contract. The Chairman

of the War Production Board is authorized to issue rules and regulations and to establish policies to coordinate and govern the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation in exercising the functions vested in them by this order.

"2. The authority herein conferred may be exercised by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, and the Board of Directors of the Reconstruction Finance Corporation, respectively, or in their discretion and by their direction, respectively, may be exercised also by and through any officer or officers or civilian officials of their respective departments and agencies designated by them for those purposes. The Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, or the Board of Directors of the Reconstruction Finance Corporation may authorize such officer or officers or civilian officials of their respective departments or agencies to make further delegations of such powers and authority within their respective departments and agencies.

"3. In inspecting any plant engaged in producing, manufacturing, processing, constructing, altering, or repairing any defense article of a secret, confidential, or restricted nature, or which is produced, manufactured, processed, constructed, altered, or repaired in accordance with or under any secret process, formula, patent, or invention, and in auditing the books and records in connection with any such defense contract, such inspection shall be regarded as secret, confiden-

tial, or restricted, as the case may be, and all reports, records, papers, documents, and writings relating to such inspection or audit shall be marked or stamped as secret, confidential, or restricted, as the case may be, and shall be handled in accordance with regulations prescribed and in force in the department or agency concerned relating to the handling of secret, confidential, or restricted matters, reports, records, papers, documents, and writings.

"4. The power to administer oaths or affirmations and to issue subpoenas for the attendance of witnesses or the production of books, records, or other documentary or physical evidence deemed relevant to the inquiry, conferred by section 1302, and, through the Department of Justice, the power to invoke the aid of any court of the United States, conferred by section 1303, Title XIII, of said Second War Powers Act, may be exercised, performed, or carried out by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, any member of the United States Maritime Commission, or the Chairman of the Board of Directors of the Reconstruction Finance Corporation, as the case may be, or by such other officer or officers or civilian officials as may be authorized, empowered or directed by any of them so to do for his respective department or agency.

"5. Nothing herein shall affect or limit the authority and power conferred upon or granted to the Chairman of the War Production Board by Title XIII of said Second War Powers Act, 1942."